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7 UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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10 GLEN ROSS,

11 Plaintiff,

NO. CIV. S-08-206 LKK/GGH

12 v.

13 O R D E R

14 SGS TESTCOM, INC., a New  
15 York corporation doing  
16 business in California;  
DENNIS DAYRIT, an individual;  
BILL GIBSON, an individual;  
and DOES 1-25,,

17 Defendants.  
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19 Plaintiff, Glen Ross, originally brought a wage and hour  
20 complaint in Sacramento County Superior Court, naming both  
21 California and non-California defendants. The defendants removed  
22 the action to federal court based on diversity jurisdiction,  
23 alleging that the California defendant, Bill Gibson, was  
24 fraudulently joined and therefore should be disregarded. Pending  
25 before the court is plaintiff's motion to remand, which contends  
26 that the California defendant was properly joined and that subject

1 matter jurisdiction in federal court is therefore lacking. The  
2 court resolves the motion on the papers and after oral argument.  
3 For the reasons set forth below, the court grants plaintiff's  
4 motion and remands the action to Sacramento County Superior Court.

### 5 **I. Background**

6 In December 2007, plaintiff Glen Ross, a citizen of  
7 California, filed a loss of wages complaint in Sacramento Superior  
8 Court against corporate defendant, SGS Testcom, Inc., and  
9 individual defendants, Dennis Dayrit and Bill Gibson. Plaintiff  
10 alleged the following seven causes of action against all defendants  
11 in his state complaint: (1) failure to pay over time (Labor Code  
12 §§ 510, 1194, 1198), (2) waiting time penalties (Lab.C. §§ 203,  
13 558), (3) failure to provide accurate itemized statements (Lab.C.  
14 § 226), (4) failure to provide meal periods (Lab.C. §§ 226.7, 512,  
15 IWC Wage Orders), (5) failure to provide rest periods (Lab.C. §  
16 226.7, IWC Wage Orders), (6) unfair competition (Business &  
17 Professions Code §§ 17200 et seq.), and (7) constructive trust. On  
18 January 28, 2008 defendants removed the case to this court.

19 Pending before the court is plaintiff's motion to remand the  
20 case to Sacramento County Superior Court.

### 21 **II. Standard for a Motion to Remand**

22 Civil actions not involving a federal question are  
23 removable to a federal district court only if there is diversity  
24 of citizenship between the parties. 28 U.S.C. § 1332(a)(1).  
25 Section 1332 requires that there be complete diversity; that is,  
26 each plaintiff's citizenship must be diverse as to each

1 defendant's citizenship. Id. A defendant may remove a civil  
2 action that alleges claims against a non-diverse defendant when  
3 the plaintiff has no basis for suing that defendant, or in other  
4 words, when that defendant has been fraudulently joined. McCabe  
5 v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).

6        "'If the plaintiff fails to state a cause of action against  
7 a resident defendant, and the failure is obvious according to  
8 the settled rules of the state, the joinder of the resident  
9 defendant is fraudulent.'" Ritchey v. Upjohn Drug Co., 139 F.3d  
10 1313, 1318 (9th Cir.1998) (quoting McCabe, 811 F.2d at 1339).  
11 Where a non-diverse defendant has been "fraudulently joined" to  
12 an otherwise completely diverse case, that defendant is  
13 disregarded for diversity jurisdiction purposes. See, e.g.,  
14 Calero v. Unisys Corp., 271 F. Supp. 2d 1172, 1176 (N.D. Cal.  
15 2003).

16        In order to establish that a non-diverse defendant has been  
17 fraudulently joined, the removing party carries the heavy burden  
18 of establishing the absence of any possibility of recovery.  
19 Ritchey, 139 F.3d at 1318. The claim of fraudulent joinder must  
20 be supported by clear and convincing evidence. Hamilton  
21 Materials Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1206 (9th Cir.  
22 2007). In determining whether a non-diverse defendant has been  
23 improperly joined, courts may look beyond the pleadings and  
24 examine the factual record. McCabe, 811 F.2d at 1339.

25        The court must initially resolve all disputed questions of  
26 fact and all ambiguities in the controlling state law in favor

1 of the non-removing party. Macey v. Allstate Prop. & Cas. Ins.  
2 Co., 220 F. Supp. 2d 1116, 1117-18 (N.D. Cal. 2002). If, after  
3 doing so, there is any possibility that the non-removing party  
4 may recover against the party whose joinder is questioned, the  
5 court must grant the motion to remand since complete diversity  
6 of citizenship and thus federal jurisdiction is lacking. Plute  
7 v. Roadway Package Sys., Inc., 141 F. Supp. 2d 1005, 1012 (N.D.  
8 Cal. 2001).

### 9 **III. Analysis**

10 Defendants removed the action to federal court pursuant to  
11 28 U.S.C. § 1441(b), alleging that Bill Gibson, a citizen of  
12 California, was fraudulently joined. Specifically, defendants  
13 assert that plaintiff has no valid cause of action against  
14 individual defendant Gibson under California law, and thus his  
15 joinder is fraudulent and his presence should be disregarded for  
16 purposes of diversity. Plaintiff maintains that there are valid  
17 claims against defendant Bill Gibson for waiting time penalties  
18 (Cal. Labor Code § 558) and unfair competition (Cal. Business &  
19 Professions Code §§ 17200 et seq.). Therefore, plaintiff  
20 asserts that joinder of defendant Gibson was not fraudulent and  
21 complete diversity in federal court is destroyed by his  
22 presence.

23 As explained below, the court finds that defendants fail to  
24 establish by clear and convincing evidence that plaintiff has no  
25 possibility of recovery against defendant Gibson. Plaintiff's  
26 motion is granted.

1 **A. Waiting Time Penalties Claim under Labor Code Section 558**

2 While plaintiff's complaint alleges all seven claims  
3 against individual defendant Gibson, plaintiff specifically  
4 argues in his motion to remand that he has a possibility of  
5 recovery under the waiting time penalties claim (Cal. Labor Code  
6 § 558) and unfair competition claim (Cal. Bus. & Prof. Code §§  
7 17200 et seq.). Defendants first argue that § 558 does not  
8 permit recovery as a matter of law and, alternatively, that  
9 there is no evidence to show that defendant Gibson may be liable  
10 under § 558.

11 **1. Section 558 Permits Plaintiff's Cause of Action**  
12 **Against Defendant Gibson**

13 Defendants maintain two arguments as to the text of  
14 California Labor Code § 558.<sup>1</sup> First, defendants assert that the  
15 plain language of Labor Code § 558 does not provide for  
16 imposition of liability on managers. Second, defendants

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18 <sup>1</sup>At oral argument, the defendants asserted for the first time  
19 that the plaintiff's allegations against defendant Gibson were  
20 proper only under Labor Code § 510, not § 558, because they allege  
21 failures to pay overtime wages. Aside from the impropriety of  
22 raising a new argument at oral argument that was not raised in the  
23 briefs, the court finds this argument meritless. Upon a plain  
24 reading of § 558, it is not evident to the court that a claim for  
25 failure to pay overtime wages could not be properly brought under  
26 this section. Even if that were the case, the specific factual  
allegations made against defendant Gibson encompass more than  
simply failure to pay overtime wages. See Notice of Removal, Ex.  
A (complaint filed in Superior Court of California, County of  
Sacramento at ¶ 5). Furthermore, the plaintiff's causes of action  
were alleged against all defendants, including defendant Gibson.  
See id. (complaint at ¶¶ 29-72). The court therefore cannot  
conclude that § 558 is not the proper avenue for the relief that  
the plaintiff seeks against defendant Gibson.

1 maintain that the legislative history of § 558 does not support  
2 the imposition of personal liability on supervisors. The court  
3 finds both arguments unpersuasive.

4 California Labor Code § 558 states, "Any employer or other  
5 person acting on behalf of an employer who violates, or causes  
6 to be violated, a section of this chapter or any provision  
7 regulating hours and days of work in any order of the Industrial  
8 Welfare Commission shall be subject to a civil penalty as  
9 follows..." (emphasis added). For the purpose of defining  
10 "person" as it is used in § 558, Labor Code § 18 provides that,  
11 "Person means any person, association, organization,  
12 partnership, business trust, limited liability company, or  
13 corporation."

14 A plain reading of § 558, therefore, indicates that a  
15 "person acting on behalf of an employer" can be subject to the  
16 civil penalties of § 558. This language tends to demonstrate  
17 that the legislature did contemplate directly holding a  
18 corporate agent or representative liable to such civil penalties  
19 under the statute. In addition, since a "person" is defined in §  
20 18 as including an individual person, this further supports the  
21 possibility that individual corporate agents are subject to the  
22 civil penalties of § 558.

23 Since the court finds that on its face, the statutory  
24 language demonstrates possible liability for individual  
25 corporate agents, it is not necessary to take judicial notice of  
26 the legislative history as requested by defendants. See Funbus

1 Systems Inc. v. California Public Utilities Com., 801 F.2d 1120,  
2 1126 (9th Cir. 1986) (explaining that only if language of statute  
3 is ambiguous, may court then consider legislative history).  
4 However, the court observes that the legislative history of §  
5 558 does not appear to support defendants' argument. Defendants  
6 point to the legislative history's complete lack of discussion  
7 regarding intent for § 558 to change the common law rule that  
8 only an employer may be liable for unpaid wages and associated  
9 penalties. This absence of discussion of individual agent  
10 liability in the legislative history does not in and of itself  
11 persuade the court that the legislature decided against such  
12 liability.

13 Defendants also argue that it is well-settled by California  
14 courts that corporate agents acting within the scope of their  
15 agency cannot be held personally liable for their employer's  
16 failure to pay wages. Defendants further maintain that because  
17 plaintiff's interpretation of Labor Code § 558 conflicts with  
18 this long-standing common law, plaintiff's interpretation should  
19 not stand. Defendants principally rely on Reynolds v. Bement,  
20 116 P.3d 1162 (Cal. 2005) and Jones v. Gregory, 137 Cal.App.4th  
21 798 (2006) in support of this contention. The court finds these  
22 cases to be inapposite.

23 In Reynolds, the California Supreme Court held that  
24 individual corporate defendants were not liable for alleged  
25 misclassifications of employees under Labor Code §§ 1194 and  
26 510. Reynolds, 116 P.3d 1162 at 1170. Since § 1194 did not

1 explicitly define "employer," the plaintiff in Reynolds  
2 suggested that the court apply the Industrial Welfare Commission  
3 (IWC) definition in which an employer was any individual who  
4 "exercises control over the wages, hours, or working conditions  
5 of any person." Reynolds, 116 P.3d at 1168; see also Wage Order  
6 No. 9, subd. 2(F). Following an examination of the legislative  
7 history of § 1194, the court concluded that the legislature did  
8 not clearly manifest intent to incorporate the IWC's definition  
9 of "employer" and impose personal civil liability on corporate  
10 agents. Reynolds, 116 P.3d at 1170.

11 Reynolds is easily distinguished from the case at hand.  
12 First, unlike Reynolds, the instant case does not deal with only  
13 a § 1194 claim against an individual defendant. Rather, the  
14 plaintiff also asserts a separate § 558 claim against individual  
15 defendant Gibson. The Reynolds court itself acknowledged that a  
16 § 558 claim and a § 1194 claim are distinct causes of action,  
17 noting that to § 558 was a potential alternative to § 1194 for  
18 holding individual corporate agents subject to civil penalties  
19 for unpaid wages. Reynolds, 116 P.3d at 1170-71; see also  
20 Jones, 137 Cal.App.4th at 810 (differentiating § 1194 and § 558  
21 claim while alluding to possibility of private enforcement of §  
22 558 through newly created Private Attorneys General Act of  
23 2004). Moreover, the Reynolds' court's holding was based on the  
24 absence of a statutory definition of "employer" in § 1194. See  
25 Reynolds, 116 P.3d at 1170. This is not the case in § 558,  
26 where, as discussed *supra*, the persons who may be liable for the



1 violation of the section are expressly described and include  
2 persons acting on behalf of an employer. Neither Reynolds nor  
3 Jones appear to be plausibly read as to bar the plaintiff's  
4 cause of action under § 558 against defendant Gibson.

5       **2. Facts In Support of Plaintiff's Section 558 Claim**  
6       **Against Defendant Gibson**

7       Finally, defendants assert that even if there were a  
8 potential claim against individual defendant Gibson under § 558,  
9 no facts exit that could be used to hold him liable. The court  
10 disagrees. The plaintiff has tendered evidence in the form of  
11 his own declaration, stating that Gibson "was in charge of the  
12 SGS Testcom, Inc. division in California. He was in direct  
13 control of my wages, hours, and working conditions at SGS  
14 Testcom, Inc. He was further directly responsible for applying  
15 the California labor laws to my employment, and to the  
16 employment of others in my department." See Declaration of Glen  
17 Ross in Support of Plaintiff's Motion for Remand ¶ 3.

18       When examining the factual record to determine fraudulent  
19 joinder, the court must initially resolve all disputed questions  
20 of fact and all ambiguities in the law in favor of the non-  
21 removing party. Macey v. Allstate Prop. & Cas. Ins. Co., 220 F.  
22 Supp. 2d 1116, 1117-18 (N.D. Cal. 2002). Here, the plaintiff  
23 has presented some evidence to support his allegation that  
24 defendant Gibson may have been acting as an agent for the  
25 corporation. Whether this evidence is credible is an ambiguity  
26 that must be resolved in favor of the plaintiff. The defendants

1 have not met their burden to show that there is no potential  
2 factual basis for recovery against defendant Gibson.

3 Because the court concludes that a potential claim exists  
4 under Labor Code § 558 as against individual defendant Gibson,  
5 it need not determine whether there is also a claim under  
6 California Business & Professions Code §§ 17200 et. seq.

7 The defendants have not established by clear and convincing  
8 evidence that defendant Gibson was fraudulently joined.

9 Consequently, the presence of defendant Gibson in this case  
10 destroys the complete diversity required in 28 U.S.C. § 1332 and  
11 the case must be remanded to the state superior court with  
12 proper jurisdiction.

13 **IV. CONCLUSION**

14 For the reasons set forth above, plaintiff's motion to  
15 remand is GRANTED and the action is REMANDED to Sacramento  
16 County Superior Court.

17 IT IS SO ORDERED.

18 DATED: April 8, 2008.  
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